

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE AVON PRODUCTS, INC.  
SECURITIES LITIGATION, :

REPORT & RECOMMENDATION

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IN RE AVON PRODUCTS, INC.  
ERISA LITIGATION, :

05 Civ. 6803 (LAK) (MHD)

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This document relates to:

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Garber v. Jung et al.,  
05 Civ. 7287 (LAK) :  
THE DERIVATIVE LITIGATION  
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FILED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
3/4/09

TO THE HONORABLE LEWIS A. KAPLAN, U.S.D.J.:

Plaintiff Robert I. Garber commenced this shareholder derivative action on behalf of Avon Products, Inc. ("Avon") and against certain senior officers of the company. He asserts a variety of claims for breach of fiduciary duty and related misconduct that largely mirror allegations found in parallel pleadings filed in a class-action securities-fraud lawsuit on behalf of purchasers of Avon shares and in an ERISA action on behalf of participants and beneficiaries in an Avon employee stock ownership plan.

Defendants have moved to dismiss the complaint, asserting that plaintiff has failed to plead a basis for not making a pre-suit demand on the Avon Board of Directors and for failure to state a claim or plead his claims with requisite specificity. They also

argue that his fiduciary-breach claims are barred by the corporate charter of Avon.

By order dated February 13, 2009, the District Court granted a motion by plaintiff to dismiss the action with the proviso that shareholders be given notice of the proposed dismissal and of the opportunity to intervene in the lawsuit if they wish to do so. The order further provides that absent a written Notice of Intent to intervene being sent to counsel and the court within thirty days, the complaint will be dismissed with prejudice as to Mr. Garber.

In view of this development, there currently appears to be no basis for addressing the merits of defendants' dismissal motion. If no one intervenes, the lawsuit will end. If another shareholder does intervene, he or she may choose to file a new pleading that will potentially cure the deficiencies noted in defendants' motion. In either event, the motion will be moot.

Under these circumstances, we recommend that defendants' motion be denied without prejudice to renewal in the event that another shareholder does intervene and either files a new complaint or chooses to rely on the complaint previously filed by Mr. Garber, presumably with an amendment as to the name of the shareholder.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable Lewis A. Kaplan, Room 1310, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007-1312. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See Thomas v. Arn, 474 U.S. 140, 150 (1985), reh'g denied, 474 U.S. 1111 (1986); DeLeon v. Strack, 234 F.3d 84, 86 (2d Cir. 2000) (citing Small v. Sec'y of Health and Human Serv., 892 F.2d 15, 16 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(d).

Dated: New York, New York  
March 3, 2009



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MICHAEL H. DOLINGER  
UNITED STATES MAGISTRATE JUDGE

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